FILED
APR 12 1941
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 943

J. D. COLLINS,

Petitioner,

vs.

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; ET AL.

No. 944

S. D. LOUNT,

Petitioner,

vs.

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; ET AL.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOHN J. McCULLOUGH,
Counsel for Petitioners.

E. E. SELDEN,
Of Counsel.

INDEX TO SUBJECT MATTER.

	Page
Petition:	
Caption	1
Statement of matter involved	2
Jurisdiction	5
Questions presented	5
Reason for allowance	6
Brief:	
Opinions below	10
Jurisdiction	10
The facts	10
Specification of errors	10
Argument	11
Point I	11
Point II	12
Point III	13
Summary and conclusion	14
Appendix	15

TABLE OF CASES CITED.

Blount v. *Walker*, 9 S. W. 804	14
Bowlin v. *Citizens Bank and Trust Co.*, 131 Ark. 97, 198 S. W. 288	11
Cole v. *Edison Company*, 53 Arizona 141, 86 Pac. (2d) 946	11
Everett v. *Haskins*, 102 Kan. 546, 171 Pac. 632	11
Frank's Estate, In re, 190 Cal. 28, 210 Pac. 417	12
Hance's Estate, 68 Pa. Super. 432	12
Kimberlin v. *Hicks*, 94 Pac. (2d) 335	12
Lachmund v. *Moore*, 192 Iowa 980, 181 N. W. 4	12
Morrow v. *Apple*, 26 F. (2d) 543	11
Messenger v. *Anderson*, 225 U. S. 436, 32 Sup. Ct. 739, 56 L. Ed. 1152	8
Schnack v. *City of Larned*, 106 Kan. 177, 186 Pac. 1012	12, 13
Sear's Estate, In re (*Olliver* v. *Sears*), 54 Arizona 52, 91 Pac. (2d) 874	7, 12
Smith v. *Teel*, 35 Arizona 274, 276 Pac. 850	7, 12

Page

Swift v. *Tyson*, 16 Pet. 1, 10 L. Ed. 865 8
Tompkins v. *Erie*, 304 U. S. 64, 58 Sup. Ct. 817 8
Vellacott v. *Murphy*, 16 F. (2d) 700 ..... 8, 11
Wemps v. *White*, 159 Mass. 484, 34 N. E. 718 11

STATUTES CITED.

Rev. Statutes of Arizona (1901), Sec. 4232 8
28 U. S. C. A., Sec. 347 (Jud. Code, Sec. 240, as amended) 5

OTHER AUTHORITIES CITED.

Bogerts Trusts, Vol. 1, page 383, Sec. 129 11
Bogert Trusts, Vol. 1, page 738, Sec. 225, note 9 11
1 Coke, Upon Littleton, L. 1, C. 1, Sec. 1 (4b) 13
65 Corpus Juris, Sec. 337 11
69 Corpus Juris, pages 556, 557, 558 and 559, Sec. 1632 7
Corpus Juris, 568, 569, Sec. 325, note 70, on page 569 11
Pomeroy's Equity Jurisprudence, Vol. 3, Fourth Edition, Sec. 987, page 2147 11
Restatement of Trusts, Sec. 99(4) 11

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 943

J. D. COLLINS,

Petitioner,

vs.

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; NIELSINE HERLICK, A WIDOW; L. SKREHOT, A WIDOWER; JOHN J. HANLON, AS TENANT; KATIE F. YOUNG, A WIDOW.

No. 944

S. D. LOUNT,

Petitioner,

vs.

HATTIE L. MOSHER, INDIVIDUALLY, A WIDOW; HATTIE L. MOSHER, AS TRUSTEE, A WIDOW; COIT I. HUGHES AND H. B. HUGHES, WIFE OF COIT I. HUGHES,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States, Greeting:

Your petitioners respectfully pray for writs of certiorari to review the decrees of the Circuit Court of Appeals entered on November 29th, 1940 (Record Collins 43),

(Record Lount 40), affirming the dismissals rendered and entered in the District Court of the United States, for the District of Arizona, Phoenix Division, October 28th, 1939, and March 18, 1940, respectively. (R. C. 19) (R. L. 18).

Short Statement of Matter Involved.

These matters were presented to the United States District Court for the District of Arizona, Phoenix Division, by complaints duly filed by your petitioners to quiet title to certain real property, and the substance of said complaints was to the effect that your petitioners are resulting *Cestuis ques trustent* of certain present and future rights in the premises described, and the rents, issues and profits thereof, under the will of Julia A. Lount, who died April 26, 1907.

Your petitioner, J. D. Collins, is the assignee for value, and successor in interest to Frances Lount, a grandchild of Julia A. Lount, deceased. Your petitioner, S. D. Lount, is the son of William B. Lount and grandson of said Julia A. Lount, deceased. William B. Lount and Hattie L. Mosher were the only children of Julia A. Lount.

The complaints set forth the text of the will of said Julia A. Lount, deceased, in *haec verba* (R. C. 9), (R. L. 11). The pertinent portions of the Will are set forth in the Opinion of the Circuit Court of Appeals in the Collins case.

115 F. (2d) 900 (R. C. 38).

The Opinion in the Collins' case is adopted as the Opinion in the Lount case (R. L. 33).

The pertinent portions of the will are as follows:

> "I give, devise and bequeath unto my son William B. Lount and to my said daughter Hattie L. Mosher, jointly, all of the residue and remainder of my property, real, personal and mixed, wherever situated, in

trust however, to be by them managed, controlled, leased, sold and distributed, in the manner following:

"(1) Said trustees shall manage, control, lease, hypothecate and sell any and all of such residue estate as they in their judgment shall deem best for the beneficiaries hereunder and without other or further authority from the probate or other court; and shall, without other authority than their own and the authority herein contained, execute deed, deeds or other instruments of conveyance of any such residue of which I may die seized, and it is my intention that such conveyance shall be sufficient in law. * * *

"(5) After the foregoing provisions have been carried out I direct that the remainder of the residue of my estate be distributed as follows:

"(a) Distribute all rents, issues and profits, and the proceeds of any sale or sales of real estate which came to me through the estate of my late husband, Samuel D. Lount, deceased, (I owning three quarters and my son owning one quarter thereof) two quarters of my said three quarters to my daughter, Hattie L. Mosher, and the other quarter to my said son.

"(b) Distribute all rents, issues and profits, and the proceeds of any sale or sales of real estate, or other property, belonging to the co-partnership of S. D. Lount and Son, my interest therein being the one-half, five of my eight sixteenths to my said daughter and the other three sixteenths to my said son.

"(c) Distribute all rents, issues and profits, and the proceeds of any sale of real estate or other property belonging to me and not otherwise hereinbefore provided for, share and share alike between my said son and daughter."

There was also provision for a succession of trustees in case of death or failure to act, but no beneficiaries are named except the trustees, and no residuary beneficiaries are named.

All of the rights of your petitioners are alleged to come primarily from the trust created by the terms of the will of said Julia A. Lount, deceased.

Petitioners' sole contention is that they are the beneficiaries of a present resulting trust in the rents, issues and profits from the land described, since the death of William B. Lount in 1924, and have an interest as resulting *Cestuis ques trustent* in the residue.

They ask that the title be quieted in the trustees; that said trustees be declared to have the title in fee simple; that the Court interpret the rights of the plaintiffs in the rents, issues and profits, and the proceeds of sales since the death of W. B. Lount August 31, 1924, and in the case of S. D. Lount, for an accounting (R. L. 9).

In defense to said complaints the respondents filed in said District Court motions to dismiss, denying that the Will of Julia A. Lount, deceased, created a trust, as alleged in your petitioners' complaint (R. C. 14), (R. L. 16), R. C. 14, 16 and 17).

Respondents' motions ta dismiss were granted by the District Court, and petitioner appealed to the Circuit Court of Appeals, Ninth Circuit, where the judgment of the District Court dismissing the complaint was affirmed (R. C. 43), (R. L. 40).

The only matter discussed in the opinion of the Circuit Court of Appeals in the *Collins* case,

115 F. (2d), at page 900,

or in the *Lount* case,

115 F. (2d), at page 903,

is the construction of the will of Julia A. Lount, deceased, and the only matter with which this petition for certiorari is concerned is with the interpretation of said will.

Statement Disclosing Jurisdiction of this Court.

These causes were commenced by complaints filed by your petitioners in the District Court of the United States, District of Arizona, Phoenix Division (R. C. 2) (R. L. 1). Said complaints allege a complete diversity of citizenship and the amount involved, in both cases, is in excess of three thousand dollars ($3,000.00).

From an adverse judgment of the said District Court, your petitioners duly and regularly appealed to the Circuit Court of Appeals, Ninth Circuit, where said adverse judgments were affirmed on November 29th, 1940 (R. C. 43) (R. L. 40). To these adverse rulings your petitioners duly filed their motions for rehearing (R. C. 44) (R. L. 41), and three months have not elapsed since the denial thereof. Jurisdiction is given this Court by 28 U. S. C. A., Sec. 347 (Jud. Code, Sec. 240, as amended).

Questions Presented.

1. The first question presented is whether a will devising all the residue of an estate to the only two children of the testatrix, naming said children as the trustees of the estate to manage and control it as they in their judgment think best for their own *benefit,* and to divide the rents, issues and profits, in varying proportions between themselves, depending upon the property involved, and providing for succession of trustees, but not naming any residuary beneficiaries whatever, creates a valid trust?

2. The second question is, whether, assuming that the will of Julia A. Lount, deceased, created a trust, in the absence of the personal right in the first beneficiaries to use and dispose of the property, does the fact that no ultimate beneficiaries are named except the two original trustees themselves, and the further fact that said trustees and bene-

ficiaries have the right to the use and enjoyment, at their discretion and for their benefit, not only of the income of the property, but of the corpus of the estate, itself, destroy the trust and vest the title in the trustee beneficiaries in fee simple?

3. The third question is, if a valid trust was created, with a possibility that there might be a residue after the death of one, or both, of the named beneficiaries, whether such possibility of residue would vest immediately as a *remainder* at the death of Julia A. Lount, deceased, and therefore vest in the immediate heirs of said deceased, namely, William B. Lount and Hattie L. Mosher, the only children of the testatrix, or whether such residue, if any, would spring up, as it were, and revert back only upon the death of one, or both, of said trustee beneficiaries, to the estate of Julia A. Lount, deceased, so that your petitioners would have a present, and future, interest therein?

Reasons for Allowance of Writ.

First Reason.

1. The Circuit Court of Appeals, Ninth Circuit, has decided an important question of local law in a way probably in conflict with applicable local decisions. The Court of Appeals said:

> "The trustees, if there is a trust, are the testatrix' children, William B. Lount and Hattie L. Mosher, the same two who are named as the sole beneficiaries of the 'trust'. They are given full powers of management and control, with power to dispose of any and all of the assets of the estate. The rents, issues and profits of the estate, and the proceeds of any sale or sales of properties are to be distributed to William B. Lount and Hattie L. Mosher in certain proportions, depending upon the source of the property sold. Such a bequest passes absolute title to the land itself." Citing cases. (R. C. 40) (R. L. 37).

The language of the will shows that, while the title to the property is devised to, and vested in, the *two trustees* in a fee, conditioned only by the trust, and no "life estate", in terms, is created; nevertheless, the beneficial interest of William B. Lount and Hattie L. Mosher is of necessity confined to a "life estate", and the trust must necessarily terminate upon the death of the last survivor of the named beneficiaries, to-wit, Hattie L. Mosher.

2. The Supreme Court of the State of Arizona in two cases has stated that a life estate will not be enlarged into a fee simple estate merely because the life tenant is given full power of sale and management for his own use and benefit.

See:

In re Sear's Estate. Olliver, et al., v. *Sears,* 54 Arizona 52, 91 Pac. (2d) 874.

And:

Smith v. *Teel,* 35 Arizona 274, 276 Pac. 850.

The questions here involved are of great general interest and importance, for not only is the land involved in this case of considerable value, but this case can well serve as a precedent for transforming any "Life Estate with power of sale into a fee simple estate, a matter which will be before the courts very frequently and has already been the subject of controversy in hundreds of cases, most of which conflict with the views expressed by the Circuit Court of Appeals in this cause.

See:

69 Corpus Juris, pages 556, 557, 558 and 559, Sec. 1632.

The opinion of the Circuit Court of Appeals, Ninth Circuit, is also probably in conflict with future decisions of the Arizona Supreme Court in deciding that no trust existed, whereas the will created a spendthrift, or discretionary,

trust. Such trusts were valid in Arizona in 1904 by reason of the common law, as well as the Revised Statutes of Arizona 1901.

See:

Section 4232, R. S. of A. 1901.

Said section is set forth in an "Appendix" to this petition and brief at page 15.

Matters concerning real property located within a particular State and the construction of wills devising real property have always been considered as matters of local concern to the courts where the land is situated and the will is probated.

Mr. Justice Holmes has said in construing a will devising real property:

> "We should lean toward an agreement with the state courts, especially in a matter like this."
>
> *Messenger* v. *Anderson,* 225 U. S. 436, at page 445, 32 S. Ct. 739, 56 L. Ed. 1152.

Especially is this true since the recent decision of this Honorable Court in the well known case of:

Tompkins v. *Erie,* 304 U. S. 64, 58 S. Ct. 817,

reversing

Swift v. *Tyson,* 16 Pet. 1, 18, 10 L. Ed. 865.

Second Reason.

That part of the opinion in the Circuit Court of Appeals, in these cases, stating that the will does not create a trust is contrary to the Circuit Court of Appeals, Fifth Circuit, in the case of:

Vellacott v. *Murphy,* 16 F. (2d) 700.

The decision of the Circuit Court of Appeals, Ninth Circuit, in the instant case is contrary to:

Vellacott v. *Murphy* (*supra*),

because in the latter case the court held that a trustee can be a beneficiary so long as he is not both the *SOLE* trustee and the *SOLE* beneficiary.

The instant case will certainly become a precedent for the theory that plurality of both trustees and beneficiaries does not sustain the validity of a trust.

For the foregoing reasons, it is respectfully submitted that this petition should be granted.

JOHN J. MCCULLOUGH,
Counsel for Petitioners,
Phoenix, Arizona,
Sixth Floor, Luhrs Tower.

E. E. SELDEN,
Associate Counsel.

BRIEF.

Opinions of the Circuit Court of Appeals.

The opinions rendered in these causes by the Circuit Court of Appeals, Ninth Circuit, are found in:

115 F. (2d), at page 900 (Collins),

and

115 F. (2d), at page 903 (Lount).

Jurisdiction.

The facts upon which your petitioners rely for jurisdiction of this Court are fully set forth in the petition for writ of certiorari, page 5 hereof, and for the sake of brevity incorporated in this brief by reference, only.

Facts.

The facts are also stated in the petition, page 2.

Specification of Errors to be Urged.

1. The Court erred in answering question 1, as set forth on page 5, of this petition and brief, to the effect that no trust was created by the will of Julia A. Lount, deceased.

2. The Court erred in holding in answer to question 2, as set forth on page 5 of this petition and brief that the power to sell the property vested in said trustee beneficiaries, vested the fee simple title in said beneficiaries.

3. The Court erred in holding in answer to question 3, on page 6 of this petition and brief that the possible residue of the estate of Julia A. Lount, deceased, vested at her death in her immediate heirs instead of springing up at the death of William B. Lount and Hattie L. Mosher.

ARGUMENT.

Point I.

There was a valid trust created because it is generally recognized that merger is not favored in the law, and will occur only where the sole trustee is also the sole beneficiary and the estate of the trustee and beneficiary are alike both as to quantity and quality.

Bogert Trusts, Vol. 1, page 383, Sec. 129.
Pomeroy's Equity Jurisprudence, Vol. 3, Fourth Edition, Sec. 987, page 2147, note in first column on page 2147 under heading "Beneficiary as Trustee."
65 Corpus Juris, Sec. 337.
Vellacott v. *Murphy,* 16 Fed. 2d 700.
Restatement of Trusts, Sec. 99 (4).

There being no local law on this subject in Arizona, Restatement of Trusts governs.

Cole v. *Edison Company,* 53 Arizona 141, at 144, line 15, 86 Pac. (2d) 946, at 947, Col. (2).

The trust created by the will of Julia A. Lount, deceased, was a spendthrift, or at least, a discretionary, trust, because the use of all or any portion of the estate was left entirely to the unfettered "judgment" of the trustees, as they might deem best. See pertinent portions of the will, page 2 thereof.

Such discretionary power, even without specific designation, created a spendthrift trust.

Morrow v. *Apple,* 26 F. (2d) 543.
Everett v. *Haskins,* 102 Kan. 546, 171 Pac. 632.
Wemps v. *White,* 159 Mass. 484, 34 N. E. 718.
Bogert Trusts, Vol. 1, page 738, Sec. 225, Note 9.

The doctrine of merger does not apply to a spendthrift trust.

Bowlin v. *Citizens Bank and Trust Co.,* 131 Ark. 97, 198 S. W. 288.
Corpus Juris 568, 569, Sec. 325, Note 70, on page 569.

Point II.

The powers of management and sale conferred upon the trustee beneficiaries did not convert the devise into a devise of a fee simple. The will devises all the rest and residue of the estate to William B. Lount and Hattie L. Mosher, jointly, "in trust", however. Page 2, hereof.

Such a devise passed the fee to the trustees, as such, but the fee is not a fee simple but a limited fee conditioned by the trust and terminating upon the termination of the trust.

The trust must *ipso facto* terminate upon the death of the last of the named beneficiaries. There can be change of trustees under the will, but no change of beneficiaries.

The beneficial estate of William B. Lount and Hattie L. Mosher is by its very nature necessarily a "life estate".

Such life estate cannot be enlarged into a fee merely because the life tenants, acting in their capacity of joint trustees and watch-dogs, each for the interest of the other;

Hance's Estate, 68 Pa. Super. 432,

have the power to sell the property for their own use and benefit.

In re Sear's Estate, *Olliver* v. *Sears,* 54 Ariz. 52, 91 Pac. 2d 874.
Smith v. *Teel,* 35 Ariz. 274, 276 Pac. 850.

The cases cited by the Circuit Court of Appeals in support of the theory that the power of sale granted by the testatrix vested a fee simple (R. C. 40, 41) (R. L. 38),

Kimberlin v. *Hicks,* 94 Pac. 2d 335, 337;
Lachmund v. *Moore,* 192 Iowa 980, 181 N. W. 4;
Schnack v. *City of Larned,* 106 Kan. 177, 186 Pac. 1012, 1014;
In re Frank's Estate, 190 Cal. 28, 210 Pac. 417, 418,

are all cases of the perpetual grant of the rents, issues and profits, and none of these cases are concerning a mere life tenancy such as the beneficial interest of William B. Lount and Hattie L. Mosher in the instant case.

In one of the foregoing cases, to-wit:

> *Schnack* v. *City of Larned*, 106 Kan. 177, 186 Pac. 1012, at page 1014,

Lord Coke is quoted as follows:

> "But if a man seised of lands in fee by his deed (or will) granteth to another the profit of those lands, and to have and to hold him to and his heires * * * the whole land itself doth passe; for what is the land but the profits thereof; for thereby vesture, herbage, trees, mines and all whatsoever parcel of the that land doth passe."
>
> 1 Coke upon Littleton, L. 1, C. 1, sec. 1 (4b).

These quaint and picturesque phrases in Old English have formed the foundation for much sound law and your petitioner respectfully suggests to this Court that the Opinion of the Circuit Court of Appeals in the instant case with its purported, though erroneous analogy to the case of "*Schnack* v. *The City of Larned*" (*supra*), may well serve as the starting point for a perversion of the legal principles laid down by Lord Coke and become the foundation for many erroneous decisions.

Point III.

It is contended in the opinion of the Circuit Court of Appeals that if there was any part of the estate of Julia A. Lount undisposed of by the terms of her Will, said estate was in the nature of a remainder, and therefore vested at the death of the testatrix in William B. Lount and Hattie L. Mosher.

Such is not the case because the vesting of the residue of the estate is necessarily postponed until the death of one or both of the trustees, leaving part of the estate undisposed of.

Blount v. *Walker*, 9 S. W. 804 at 807.

Summary and Conclusion.

Because the Will of Julia A. Lount did create a valid Spendthrift or Discretionary Trust, and did vest a valid "Life Estate" in William B. Lount and Hattie L. Mosher, it is apparent that the decision of the Circuit Court of Appeals, Ninth Circuit, in holding that a fee simple is vested in said parties by the unlimited power of sale is contrary to the well settled local law of Arizona, and contrary to a decision of another Circuit Court of Appeals, upon very important and much litigated points of law.

For the foregoing reasons, it is respectfully submitted that a Writ of Certiorari be granted.

JOHN J. MCCULLOUGH,
Counsel for Petitioners. Sixth Floor, Luhrs Tower, Phoenix, Arizona.

E. E. SELDEN,
Associate Counsel.